

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Venetian Casino Resort, LLC and Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226 and Bartenders Union, Local 165, affiliated with Hotel Employees and Restaurant Employees International Union. Case 28–CA–16000

April 29, 2009

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

On September 30, 2005, the National Labor Relations Board, by a three-member panel, issued a Decision and Order¹ in this proceeding, in which it adopted all of the administrative law judge's findings. The judge had found that the Respondent violated Section 8(a)(1) of the Act by: (1) summoning the Las Vegas Metropolitan Police and requesting that they issue trespass citations to peaceful union demonstrators and exclude them from the sidewalk in front of the Respondent's facility; (2) repeatedly informing the demonstrators, via a recorded message broadcast over a public address system, that they were subject to arrest for trespassing on private property; and (3) informing Union Business Agent Glen Arnodo, a participant in the demonstration, that he was being placed under citizen's arrest, and the following day contacting the police to report the incident. The Board ordered the Respondent to cease and desist from this activity and to take certain affirmative action.

Thereafter, the Respondent filed a petition for review with the United States Court of Appeals for the District of Columbia Circuit, and the Board filed a cross-application for enforcement of its Order. The court enforced the portions of the Board's Order addressing the broadcasting of the trespass message and the attempt to effect a citizen's arrest. The court, however, held that the Board had failed to consider the Respondent's contention, in defense of its summoning the police, that its conduct constituted direct petitioning of the Government, and as such was protected by the First Amendment. The court remanded that issue to the Board.² Subsequently, the General Counsel, the Charging Party, and the Respondent filed statements of position.

¹ 345 NLRB 1061.

² 484 F.3d 601, 610, and 614 (2007), cert. denied 128 S.Ct. 1647 (2008).

The National Labor Relations Board³ has reconsidered the remanded finding. Based on the particular circumstances of this case, we have decided to withdraw the finding, and we therefore respectfully decline to resolve the issues it presents.

The central events underlying this case occurred on March 1, 1999, a little more than 10 years ago. Those events and the controversies leading up to them have now been considered, not only in this proceeding, but in Federal civil litigation between the Respondent and the Union culminating in a decision of the United States Court of Appeals for the Ninth Circuit and the Supreme Court's denial of the Respondent's request for certiorari.⁴

Under the unusual circumstances of this case, we do not believe that it would be a good use of the Board's limited resources to determine the lawfulness of the Respondent's call to the police and requests for action. Determining their legality would require the Board to decide difficult legal issues not previously decided by the Board or the courts, and in circumstances where the employees' Section 7 rights have been effectively vindicated.⁵

It will more fully effectuate the policies of the Act to require the Respondent to comply immediately with the enforced provisions of the Order in this case. By requiring the Respondent to cease and desist from playing a trespass message directed at peaceful union demonstrators, and to cease and desist from informing them that they are being placed under citizen's arrest, or engaging in any like or related conduct that interferes with Section 7 rights, we substantially affirm the rights of individuals to engage in Section 7 activities on the sidewalk in front of the Respondent's facility. That is particularly true here because, in non-Board litigation, the courts have resolved the property rights issue and found that the sidewalk in front of the Respondent's facility is a "public forum" from which the Respondent may not exclude individuals engaged in permissible exercises of their

³ Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

⁴ See *Venetian Casino Resort v. Local Joint Executive Board*, 257 F.3d 937 (2001), cert. denied 535 U.S. 905 (2002). In its decision, the Ninth Circuit upheld the determination of the district court that the sidewalk alongside the Respondent's property is a "public forum," from which the Respondent may not exclude individuals engaged in expressive activity protected by the First Amendment. *Id.* at 940, 948.

⁵ See *Harrison Steel Castings Co.*, 293 NLRB 1158, 1159 (1989), pet. for review dismissed 923 F.2d 542 (7th Cir. 1991).

right to expression under the First Amendment. *Venetian Casino Resort v. Local Joint Executive Board*, 45 F.Supp.2d 1027, 1036 (D.Nev. 1999), affd. 257 F.3d 937 (9th Cir. 2001), cert. denied 535 U.S. 905 (2002). The ruling and Order we issue today are sufficient to protect the Section 7 rights implicated in this case. We therefore withdraw the finding that the Respondent violated Section 8(a)(1) by summoning the police.

We will modify the Board's original order in conformity with this decision.

ORDER

The Board's Order, reported in 345 NLRB 1061 (2005), is reaffirmed as modified below.

1. Delete paragraph 1(a) and reletter the subsequent paragraphs.

2. Substitute the attached notice for that attached to the Board's original Decision and Order.

Dated, Washington, D.C. April 29, 2009

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT do anything that interferes with these rights.

Specifically:

WE WILL NOT read or play a recording of a trespass message over a loudspeaker directed to individuals who are peacefully demonstrating and engaging in lawful conduct on behalf of the Union, or any other labor organization, on the sidewalk in front of our property adjoining Las Vegas Boulevard South, Las Vegas, Nevada.

WE WILL NOT place agents of the Union, or any other individuals, who are engaged in a peaceful demonstration and lawful conduct on behalf of the Union, or any other labor organization, on the sidewalk in front of our property adjoining Las Vegas Boulevard South, Las Vegas, Nevada, under citizen's arrest, or contact the Las Vegas Metropolitan Police Department to report the incident.

WE WILL NOT in any similar manner interfere with, restrain, or coerce individuals in the exercise of the rights guaranteed them by Section 7 of the Act.

VENETIAN CASINO RESORT, LLC